After applying that standard of review to Homer Township's case, the Commission found that the township had not met its burden of proof, and granted the utility's motion for a directed finding without hearing any rebuttal evidence from the utility. Id. In Homer Township, the Commission found that the township failed to meet its burden of proof to demonstrate its proposal would better serve the public interest. In making this finding, the Commission cited, among other reasons, the fact that the Township: had conducted little analysis pertaining to the costs of acquiring, operating or maintaining the utility facilities; had not sufficiently addressed the Commission's concerns regarding service to utility customers residing outside the township boundaries; and had not presented any analysis of the impact the condemnation would have on the remainder of the utility customers outside the district being condemned. Id. at p. 14. The Commission noted that "[a]bsent such information, it is impossible for the Commission to determine whether the condemnation would best serve the public, the public interest and the balance of Metro's utility users," and therefore "the evidence demonstrates that Homer has not met the standard to receive Commission approval for condemnation." Id. pp. 13-14. Despite a similar failing by Pekin, Illinois-American chose to submit rebuttal evidence to clearly establish the public interest in this case.

As noted above, Staff and the City disregard the previous Commission orders that specifically reject the lower standard suggested by Staff and the total absence of a public interest standard offered by the City. Although, Illinois-American cited and explained the Homer Township case in its Reply Brief (pages 2, 6-8), the Staff and the City totally ignore it in their Briefs on Exceptions and make no attempt whatsoever to distinguish its application to the present case.

It should be noted that, in Homer Township, the Commission also concluded that the Township's petition must be denied because the Township did not have the statutory authority to condemn utility property outside its boundaries. As discussed in Illinois-American's Brief on Exceptions (pages 2-7), the statute Pekin relies on for its authority to condemn, (Division 130 of the Municipal Code), like the statute in Homer Township, also does not grant extra-territorial condemnation authority. The Commission should conclude in the present case, like it did in Homer Township, that the City lacks the authority to condemn outside its boundaries.

It is clear from the prior Commission orders and case law, that when evaluating what is in the better public interest the Commission by necessity must conduct a comparative analysis of the viable alternatives presented rather than simply considering the City's evidence in a vacuum as suggested by both the City and Staff. The Proposed Order correctly recited the appropriate comparative analysis to be followed in the application of the "public interest" standard as the standard was explained in Illinois Power Company, Docket 81-0818 (1982), aff'd, Illinois Power Co. v. Commerce Comm., 111 Ill. 2d 505 (1986).

In that case, Illinois Power Company ("IP"), a combination electric and gas utility, entered into an agreement with Mr. Carmel Public Utility Company ("Mt. Carmel"), a smaller combination utility, under which IP would acquire Mt. Carmel by merger. IP proposed to transmit electricity over lines of Central Illinois Public Service Company ("CIPS"), another combination electric and gas utility, that surrounded Mt. Carmel on three sides (the fourth side of Mt. Carmel's service area being the Illinois/Indiana border). CIPS intervened in the proceeding initiated to review IP's Petition seeking

approval of the merger. As explained by the Commission (Docket 81-0818, Order, p. 3), CIPS requested that, "the Commission deny its approval of the transactions proposed by Illinois Power if the facts show that the acquisition of ownership and control of Mt. Carmel by CIPS rather than by Illinois Power would best serve the public interest." (Docket 81-0818, IP Order, p. 3.) Thus, although Docket 81-0818 did not involve a condemnation proposal, it did involve Commission review under the public interest standard of competing proposals for acquisition of a public utility.

In Docket 81-0818, IP maintained that, in evaluating the public interest, the Commission should ignore CIPS' proposal and consider the originally filed proposal in a vacuum. According to IP, the IP/Mt. Carmel proposal should be approved if it was "adequate," with no requirement that it also be "better" than the competing proposal submitted by CIPS. The Commission, however, rejected this argument, stating as follows:

> The Commission is further of the opinion that in applying the public interest standard to a proposed merger, it should consider viable and mutually exclusive alternative proposals suggested to it. The question whether a merger is in the public interest can be meaningfully answered only within the context of possible alternative actions. If a viable, mutually exclusive alternative would better serve the public interest, a proposed merger should not be approved.

(Docket 81-0818, Order, pp. 4-5).

In its Order, the Commission went on, as it did in Fernway Sanitary District and in Homer Township, to conduct a comparative analysis of "factors that properly comprise the public interest." (Docket 81-0818, Order, pp. 5-9.) As the Commission explained, the "'[p]ublic interest' is necessarily a broadly defined term; many factors may be considered." (Docket 81-0818, Order, p. 5.) The Commission went on to compare the alternative proposals of IP and CIPS, examining such factors as contiguity of the

properties, simplification of facility planning interest of the ratepayers and relative cost of service. Based on the comparative analysis, the Commission concluded (Docket 81-0818, Order, p. 9) that CIPS' proposal was superior to that of IP and that IP's proposal was, therefore, not in the public interest. For this reason, IP's Petition was denied.

IP appealed the Commission's Order in Docket 81-0818 and the dispute over proper application of the public interest standard was, ultimately, addressed by the Illinois Supreme Court, stating as follows:

> We consider that the Commission was correct in concluding that "[t]he question whether a merger is in the public interest can be meaningfully answered only within the context of possible alternative actions." (Throughout its order the Commission used "public convenience" interchangeably with "public interest.") It is obvious that the optimum public good may not be attained if the Commission can consider only what the petition before it proposes.

111 Ill. 2d at 513.

The Illinois Supreme Court went on to conclude that the record supported the Commission's conclusions based on the comparative analysis, and the Commission's Order was affirmed. See also Klopf, 54 Ill. App. 3d at 498-99 (Commission denied approval for sale of abandoned railroad property to adjoining landowners, finding instead that the public interest would be better served by the plan of an intervenor, the Department of Conservation, to use the land as a nature trail). Thus, it is well established that, under the "public interest" standard, the Commission when presented with two alternatives should conduct a comparative analysis and approve a filed proposal only if it is in the better public interest.

B. Even under the more limited public interest standard suggested by Staff, the City failed to meet its burden of proof.

While Illinois-American agrees with the Staff's ultimate conclusion (Staff BOE, p. 8) that the City failed in its burden of proving that granting it eminent domain authority would serve the public interest, the Company disagrees with Staff's rejection of the comparative better public interest analysis which is thoroughly discussed above (Section III(A)). The Staff (Staff BOE, pp. 1-4) suggests a "stand-alone" public interest standard which, as demonstrated above, is inconsistent with prior orders of the Commission and Illinois caselaw. Although the Staff (Staff BOE, pp. 1-2) criticizes the Commissioner's decision in Fernway as "speculative" and "manufactured," the Staff fails to provide any type of reasoned analysis to support a departure from the reasoned interpretation of Section 7-102 of the EDA by the Commission, which is the body charged with application of the relevant position of the Section. Staff also ignores the more recent Homer Township ruling, as well as the other cases cited by the Company on this issue. For these reasons, Staff's proposed modifications (Staff BOE, pp. 2-5) to the language of Section III ("Role of the Commission in Condemnation Matters") and page 37 of the Proposed Order should be rejected.

IV. THE PUBLIC INTEREST ANALYSIS (SECTION V (C))

A. Response to the City

1. The Proposed Order does not impose a "more stringent standard" than the public interest standard.

The Proposed Order makes clear its conclusion with regard to the standard of proof: "In this proceeding, the Commission determines that the City bears the burden to prove that its proposal to condemn the Pekin District assets needed to serve both residents and non-residents of the City is superior from a public interest standpoint to

continued ownership and operation of those assets by Illinois-American." [Prop. Order, p. 5.] As discussed above, this conclusion is fully consistent with sound policy considerations and Illinois law. In its BOE (p. 6), however, Pekin claims that the Proposed Order "actually holds Pekin to a standard of proof that is even more stringent than the public interest standard it purports to apply." In this regard, however, Pekin's BOE sets up a strawman. The Proposed Order does nothing of the kind.

In support of the argument that the Proposed Order imposes a "more stringent standard," Pekin's BOE refers to language on page 40 of the Proposed Order:

> The final matter that must be addressed is whether the City, in supporting its bid for eminent domain authority, proved that continued operation of the water system by the Utility, would not be in the public interest. In reviewing the evidence, the Commission concludes that none of the matters propounded by the City in support of its request require the Commission to conclude that the Utility has failed in its public duties.

According to Pekin (BOE, p. 6), this language requires that, to prove its case, Pekin was "required" to show that Illinois-American has failed in its public duties. Pekin goes on (BOE, p. 7) to characterize this supposed requirement as a "fault based concept" and a "legally erroneous" standard of proof. The referenced language, however, does not establish any "standard for decision" or "requirement" more stringent than the public interest standard. Instead, the language properly rejects claims regarding the service and operations of Illinois-American which Pekin itself elected to make. (These claims related to such allegations as low water pressure, incorrectly painted fire hydrants, gravel in mains, and the existence of small mains.) As the Proposed Order correctly concludes, Pekin was unable to support its claims that the service or facilities of IAWC are inadequate. [Prop. Order, pp. 40-41.] Pekin cannot

properly criticize the Proposed Order for setting out findings about issues that Pekin itself chose to raise.

2. The Proposed Order does not impose an impossible requirement.

As a part of the "Public Interest Analysis," the Proposed Order states:

> The factor that the Commission finds most compelling in its conclusion is the very rudimentary nature of the City's plans in the event that eminent domain were granted. Paramount in this matter is the City's failure to have even begun the process of selecting a system operator, which all parties agree will have to be done prior to the City taking the reins and providing service to the utilities' customers. Without some firm grasp over the identity of the system operator and the expense attributable to the operation, the Commission is entirely unable to judge the wisdom of turning such an important public service over to the city or to judge the impact of such a course of action. With the waterworks operated by the utility, the Commission is in a position to regulate the system operator and assure the continued viability of the service at just and reasonable prices.

[Proposed Order, p. 39.] Pekin suggests that these findings impose an "impossible standard that no petitioner can meet." [Pekin BOE, p. 8.] The Proposed Order's findings, however, are fully consistent with the evidence of record and the proper standard of proof, as discussed above, and should not be modified.

As the record shows, Pekin submitted to the Commission in this proceeding a proposal which was largely undefined. Pekin's Petition suggested, in part, that, as compared to Illinois-American, it could offer Pekin District customers improved service at lower rates. As it turned out, however, Pekin was wholly unable to support its position. In fact, the City made no effort whatsoever to analyze the needs of the system or to formulate a specific operating plan or capital plan. [Tr. 191-98.] The City has no plan explaining how it will run the water system, and cannot agree even among its own witnesses how many employees it will require. [Pekin Exs. 1.0, p. 6; 7.0, p. 6; IAWC Ex. 4.0R, pp. 2-3.] The City has no idea what types of capital projects it will undertake

or forego, what its operating costs will be, or how non-residents will be treated. [IAWC Ex. 3.0, p. 24; Pekin Ex. 1.0, p. 5; Tr. 186-88.] The City claims there could be economies from mass purchasing, but cannot back up that assertion with any specific information about what these economies may involve or how much they may be. [IAWC Ex. 2.0R, p. 7.]

The City states that it will hire a contract operator to run both the wastewater and water system, but not only does the City have no idea who that operator will be, the City has made no effort to identify the minimum performance standards the operator would need to meet, specify the responsibilities the contract operator would have, or describe the split and/or overlap of authority to make decisions between the City and the proposed contract operator. [IAWC Ex. 1.0, pp. 22-23.] The City has not determined who ultimately would be responsible for meeting drinking water requirements, paying fines, obtaining IEPA permits or filing regulatory compliance reports. [Id.] The City admits that its relationship with the current contract operator for the wastewater system, United Water, has encountered significant difficulties, and as discussed below, the contract operator approach has not adequately addressed system requirements for the wastewater system. [Tr. 235-365; IAWC Ex. 1.0, p. 22.] Based on the City's lack of planning, the difficulties encountered by both Pekin and other cities, such as Atlanta, with contract operators, as well as the complex nature of the specification and bid process, there is absolutely no basis to conclude that the retention of a contract operator, if one were hired under City ownership would be in the public interest. Based on his investigation, Staff witness Smith concluded that there was "no plan or evidence

supporting" the assumption that a contract operator would be hired at all. [Staff Ex. 5.00, p. 4.]

Prior to and during the hearing, the City claimed that it has the expertise to run the water system based on its "exemplary" and "outstanding" experience with wastewater operations. Only after the proof established its abysmal environmental and operational track record, did the City contend that consideration of its wastewater performance is beyond the scope of this proceeding. Not only has Pekin utterly failed to meet its burden of proving that the service will improve under City ownership, the evidence presented demonstrates that service will likely decline under City ownership. As stated by IAWC witness Stack, "continued ownership and operation of the Pekin District system by Illinois-American, with oversight by the Commission, is clearly preferable to condemnation by Pekin from a public interest standpoint." [IAWC Ex. 11.0R, p.7.]

In its BOE (p. 8), Pekin claims that, in finding that Pekin did not support its assertions, the Proposed Order requires Pekin to "predict the future" and, thereby, raises an impossible standard. These assertions, however, are absurd. In finding correctly that Pekin failed to prove its case with regard to service and rates under City ownership, the Proposed Order places on Pekin a burden no different than that faced by any petitioner before the Commissioner in cases subject to a public interest standard, e.g., future test year rate proceedings, certificate proceedings and others. Petitioners before the Commission often are required to present evidence demonstrating how future rates and service will be affected by a proposal.

How should the Commission react if a utility seeking a Certificate of Public Convenience and Necessity under Section 8-406 of the Act (220 ILCS 5/8-406) to serve an area maintained that it had no idea how it would provide service, what capital improvements were involved, what the cost would be, or how customers would be affected? If this were to occur, we suspect the utility's petition would be denied, just as the Proposed Order recommends in the case of Pekin's Petition in this proceeding.

Contrary to Pekin's assertions in its BOE (pp. 8-10), the Proposed Order (p. 40) does not require that Pekin "obtain a commitment" from a particular contract operator. The Proposed Order (p. 40) finds only that Pekin did not submit information regarding plans for future operation of the system, so that costs and service standards under City ownership could be analyzed. As the Proposed Order (p. 40) correctly finds and the evidence discussed above shows, the City's described plans are "very rudimentary."

It is not the responsibility of the Commission or Illinois-American to suggest to Pekin how it could try to develop adequate evidence. We note, however, that Pekin did not specify minimum qualifications it might require for a contract operator. [IAWC Ex. 1.0R, p. 3.] Pekin also did not present evidence it might have obtained from one or more contract operators by contacts less formal than a Request For Proposal ("RFP"), such as writing letters or other communication with one or more potential contract operators to identify resources that a contract operator might provide. As discussed above, Pekin did not, through its own witnesses or outside witnesses, present any operating or capital plan. [IAWC Ex. 1.0, p. 20.] As Staff witness Smith correctly observed, Pekin provided "no plan or evidence" at all supporting the assumption that a contract operator would be hired. [ICC Staff Ex. 5.00, p. 4.] In light of this situation, the

Proposed Order's characterization (p. 39) of Pekin's filing as a "pig in a poke" is entirely accurate. Pekin's presentation, in that regard, was not significantly different from that presented by Homer Township in its attempt to condemn Metro Utilities (Docket 92-0258); a docket in which, as discussed above, the Commission directed a decision against the township without even hearing rebuttal evidence from the utility.

In its BOE (pp. 8-10), Pekin departs from the evidentiary record in a rambling discussion of difficulties it would have had in preparing a formal request for proposal and obtaining commitment from a contract operator. Aside from the fact that this discussion is not based on record evidence, the discussion is also unpersuasive because the Proposed Order does not require that a contract operation be hired at this time. The Proposed Order (p. 40) indicates only that Pekin did not present evidence supporting its position with regard to rates and service under City ownership. The City had a myriad of actions it could have taken in an effort to develop evidence of how operation would be under its ownership, but the City failed to provide any persuasive evidence.

The City also claims that the Proposed Order imposes an impossible burden on petitioners because it allegedly requires proof that the utility failed in its public duties at the same time as the Commission is charged with ensuring that the utility does not so fail. Pekin BOE, p. 7. The City continues by asserting that "obviously, IAWC is obligated to meet service obligations " because of the Public Utilities Act's requirements. Id. The City quite simply fails to recognize that there are public utilities which are regulated by the Commission and which, despite the Commission's best efforts, fail to provide adequate service. The Company references Crystal Clear Water Company,

Highland Shores Water Company, McHenry Shores Water Company, Northern Illinois Utilities, Inc., Wonder Lake Water Company, and Oakview Avenue Water Works, Inc.

3. The Proposed Order properly rejects Pekin's claims with regard to Illinois-American's main replacement and capital planning programs.

Pekin (BOE, pp. 10-12) offers a somewhat confusing argument, suggesting that the Proposed Order (pp. 40-41) improperly requires a showing that IAWC "failed in its public duties" in connection with main replacement efforts. As discussed above, however, the referenced language of the Proposed Order does not establish a standard more stringent than the public interest standard. As is clear from the context, the referenced language finds only that Pekin did not provide evidence sufficient to support claims it chose to raise in support of its Petition with regard to the services and facilities of Illinois-American.

The record makes clear that Pekin's argument (BOE, pp. 10-12) and suggested replacement findings (Pekin Exc., p. 38) are not supported. As the record shows, the City admittedly performed no analysis whatsoever of the impact the small mains have on the Pekin District system, and has no basis to conclude that the small mains provide "inadequate flow" or pose a "safety hazard." [Tr. 191-98; IAWC Ex. 1.0R, pp. 1-2, 9.] In contrast, in 2002, Illinois-American performed a comprehensive analysis, using a hydraulic model of the entire Pekin distribution system, which demonstrated that because the system is an integrated system, meaning there is no one area with a mass concentration of small diameter mains, there are no areas in which water pressure or rate of flow is inadequate, and no "safety hazard" is posed by the existence of small mains. [IAWC Ex. 3.0, pp. 16-17.]

The evidence also refutes the City's position that Illinois-American has not adequately addressed the issue of small mains in the Pekin system. With City input, Illinois-American completed an ambitious small main prioritization project, which catalogued all of the mains in the Pekin system with a diameter of four inches or less, analyzed the impact each small main segment has on the provision of water, and scheduled those mains for replacement based on need. [IAWC Ex. 3.0, pp. 11-12.] The City's assertions with regard to small main replacement are completely unfounded. The City has no basis whatsoever to determine which small mains are "inadequate" because it has performed no analysis at all. The City participated in Illinois-American's small main replacement program and approved the approach, and now claims it is insufficient based only on its ad-hoc characterization of certain unspecified mains as "inadequate." [IAWC Ex. 4.0, p. 11.]

The City (BOE, p. 11) also criticizes Illinois-American's small main replacement plan because, as with any business decision, there is a possibility the plan could have to be altered sometime in the future due to an unforeseen change in financial conditions. Of course, the City has no substitute main replacement plan to offer, other than to surmise that the City could forego other "less essential" capital improvements to funnel more money to small main replacement. The City's suggestion regarding foregoing "less essential" capital improvements is meaningless, however, because the City has not performed any analysis, and has no basis to conclude what improvements would be "less essential." [Tr. 191-98, 206-09; IAWC Ex. 1.0R, pp. 1-2, 9.] The City pointedly claims Illinois-American's small main replacement plan is subject to possible

change, all the while hoping the Commission does not notice the City has no plan whatsoever.

In its BOE (p. 12), the City goes on to assert that "[n]o plans are yet in place," with regard to water flow in the Sunset Hills area. This assertion is false, and directly contradicted by the evidence of record. As the record shows, during the 2002 CPS update process, the computer hydraulic model of the Pekin District was utilized to look at larger distribution system needs and in particular the needs of the Sunset Hills portion of the system. [IAWC Ex. 3.0, p. 17.] As set forth above, further analysis of the Sunset Hills portion of the distribution system revealed that installation of a booster pump station at the Court Street Elevated Tank would increase pressures in this area on average by 15 pounds per square inch ("psi") and increase fire flows by 50% or more. This improvement project will also include a standby generator and valving at the existing Court Street Reservoir Booster Pump Station and interconnection with the Sheridan Hills service area. [Id.] Mr. Johnson's testimony makes clear that the Sunset Hills project will be complete in 2004. [IAWC Ex. 3.0R, p. 4.]

Pekin's BOE (p. 12) also mischaracterizes the record regarding its allegation that there is gravel in the mains. As Pekin would have it, this is a problem discussed in alleged "newspaper reports," which, according to Pekin, IAWC had no interest in investigating. Once again, Pekin's position is baseless. When questioned further about this alleged problem, Pekin's witness admitted the City had no records or documentation of any such problem; that, in fact, there was no evidence that IAWC had been made aware of the perceived problem; and that he personally had made no efforts to complain, either in writing or verbally, about the problem to anyone at IAWC or the